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**NO. 50252-6-II**

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION TWO

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STATE OF WASHINGTON,

Respondent,

v.

**JESUS GORDILLO-REYES,**

Appellant.

---

ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR PIERCE COUNTY

The Honorable Gretchen M. Leanderson, Judge

---

**BRIEF OF APPELLANT**

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### **A. ASSIGNMENTS OF ERROR**

1. The trial court erred in accepting Mr. Gordillo-Reyes' guilty plea when the plea was not knowing, voluntary, and intelligent because it failed to provide Mr. Gordillo-Reyes with correct information about community custody, a direct consequence of his guilty plea.

2. The court impermissibly imposed a broad no contact sentencing condition prohibiting any contact between Mr. Gordillo-Reyes and minors without considering Mr. Gordillo-Reyes' right to parent his minor daughter.

### **B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. A guilty plea is only constitutionally valid if it is knowing, voluntary, and intelligent. A guilty plea is only knowing, voluntary, and intelligent if the defendant is advised of all the direct consequences of his plea. The applicability of community custody to a sex offense sentence is a direct consequence. Mr. Gordillo-Reyes pleaded guilty to four counts of child molestation in the second degree but was improperly advised he would receive 36 months of community custody. Was Mr. Gordillo-Reyes' guilty plea knowing, voluntary, and intelligent?

2. A court may not use its sentencing authority to impose a no contact order restricting a parent's right to see or communicate with his

own child unless the court conducts a fact-specific inquiry and finds the particular needs of the child make such restrictions reasonably necessary. The court's sentencing condition that Mr. Gordillo-Reyes have no contact with minors prohibits him from having any contact with his young daughter. When Mr. Gordillo-Reyes' daughter was not a victim, did the court's order deny Mr. Gordillo-Reyes the ability to contact his daughter without finding the restriction reasonably necessary to protect his daughter?

### **C. STATEMENT OF THE CASE**

Mr. Gordillo-Reyes pleaded guilty to an amended information charging him with four counts of child molestation in the second degree. CP 7-18; RP 2/3/17 at 4-20. Mr. Gordillo-Reyes' language is Spanish. A Spanish language interpreter assisted him at the plea. CP 16; RP 2/3/17 at 4.

The "Statement of Defendant on Plea of Guilty" lists several paragraphs under the heading "In Considering the Consequences of My Guilty Plea, I Understand That:." CP 8-15.

Included in the consequences that are explained are the offender score, the standard range of confinement, the applicability of any sentencing enhancements, the total actual confinement, and the

maximum term of incarceration and fine. CP 8. The standard range and the total actual confinement for each count is listed as 87-116 months. CP 8. The maximum term of confinement on each count is 120 months. CP 8.

Although there is a section to specify the length of community custody, the section is blank on Mr. Gordillo-Reyes' plea form. Boilerplate text in the header reads, "(Only applicable for crimes committed on or after July 1, 2000. For crimes committed prior to July 1, 2000 see paragraph 6(f). For crimes committed prior to July 1, 2000 see paragraph 6(f))." CP 8.

Paragraph 6(f) takes the reader to two pages of paragraphs that could apply to Mr. Gordillo-Reyes as none have been crossed out or otherwise stricken to specify their inapplicability. CP 9-10. Paragraph 6(f)(ii) appears to include the information relevant to Mr. Gordillo-Reyes' plea.

If this offense is a sex offense that is not listed in paragraph 6(f)(i) [child molestation in the second degree is not] then in addition to sentencing me to a term of confinement, the judge may order me to serve up to one year of community custody if the total period of confinement ordered is not more than 12 months. If the period of confinement is over one year, or if my crime is failure to register as a sex offender, and this is my second or subsequent conviction of that crime, the judge will sentence me to community

custody for 36 months or up to the period of earned release, whichever is longer. During the period of community custody to which I am sentenced, I will be under the supervision of the Department of Corrections, and I will have restrictions and requirements placed upon me, which may include electronic monitoring.

CP 10 (emphasis added).

At section (6)(g), the prosecutor's recommendation on plea includes a 120 month agreed exceptional sentence and community custody without reference to the length of the term of community custody. RP 11.

At the plea hearing, the court noted Mr. Gordillo-Reyes would be "subject to community custody." RP 2/3/17 at 12.

During the plea, the court referenced Mr. Gordillo-Reyes not having any contact with minors. RP 2/3/17 at 12. However, at Mr. Gordillo-Reyes' request, and with the state's approval, the court allowed Mr. Gordillo-Reyes telephonic contact with his daughter, N, if her mother was present. N was not a victim although Mr. Gordillo-Reyes knew the victims as his daughter's friends. RP 2/3/17 at 17-18.

At the sentencing hearing, the state recommended there be no contact with the victims or minors. RP 4/14/17 at 22. There was no discussion of excluding the daughter from the no contact with minors

provision. RP 4/14/17 at 27-28. As a sentencing condition, the court imposed a no contact condition with minors with no reference to exclusion of the minor daughter. CP 28.

The court imposed an exceptional 120 month sentence with no community custody. CP 28-29, 37-38.

Within weeks of his sentencing, Mr. Gordillo-Reyes sent a letter to the trial court asking for contact with his daughter. CP 48-50. To date, there is no order allowing Mr. Gordillo-Reyes contact with his young daughter.

Mr. Gordillo-Reyes filed a timely notice of appeal. CP 40-41.

#### **D. ARGUMENT**

**Issue 1: Mr. Gordillo-Reyes' guilty plea is invalid because it failed to accurately notify him about community custody.**

Mr. Gordillo-Reyes' guilty plea is invalid because he was misinformed about the community custody that could be imposed as part of his sentence. His case should be remanded to the trial to allow him to withdraw his plea as it was not knowing, intelligent, and voluntary.

a. The plea form wrongly informed Mr. Gordillo-Reyes he would be sentenced to community custody as a consequence of pleading guilty.

"Due process requires an affirmative showing that a defendant entered a guilty plea intelligently and voluntarily." *State v. Ross*, 129 Wn.2d 279, 284, 916 P.2d 405 (1996); U.S. Const. Amend. V and XIV, Wash. Const. art. I, § 3. A guilty plea is otherwise invalid. *State v. Branch*, 129 Wn.2d 635, 642, 919 P.2d 1228 (1996). This standard is reflected in CrR 4.2(d), "which mandates that the trial court 'shall not accept a plea of guilty, without first determining that it is made voluntarily, competently and with an understanding of the nature of the charge and the consequences of the plea.'" *State v. Mendoza*, 157 Wn.2d 582, 587, 141 P.3d 49 (2006). "Under CrR 4.2(f), a court must allow a defendant to withdraw a guilty plea if necessary to correct a manifest injustice." *In re Pers. Restraint of Isadore*, 151 Wn.2d 294, 298, 88 P.3d 390 (2004). "An involuntary plea produces a manifest injustice." *Id.*

A guilty plea is not knowingly made when based on misinformation regarding a direct sentencing consequence. *Mendoza*, 157 Wn.2d at 584, 590-91; *In re Pers. Restraint of Quinn*, 154 Wn. App. 816, 835-36, 226 P.3d 208 (2010). A sentencing consequence is direct when "the result

represents a definite, immediate and largely automatic effect on the range of the defendant's punishment." *Ross*, 129 Wn.2d at 284.

Mandatory community custody or community placement is a direct consequence because it affects the punishment flowing immediately from the guilty plea and imposes significant restrictions on a defendant's constitutional freedoms. *Ross*, 129 Wn.2d at 285-86; *Quinn*, 154 Wn. App. at 836.

In Mr. Gordillo-Reyes' case, the plea form sets forth, in discrete paragraphs, a number of consequences flowing from the plea. CP 8-11. These consequences apply by default. To opt out of the consequence, the paragraph must be stricken and initialed by both the judge and the defendant.

The paragraphs informing Mr. Gordillo-Reyes that the judge would sentence him to community custody for crimes committed after July 1, 2000 were not stricken or initialed. CP 9-10. The plea form plainly states without qualification that "If the period of confinement is over one year ... the judge will sentence me to community custody for 36 months or up to the period of earned release, whichever is longer." CP 10.

In this manner, Mr. Gordillo-Reyes was misinformed about a direct consequence of his plea. The standard range of 87-116 months on crimes

with 120 month statutory maximums does not allow for 36 months of community custody because the sentence would exceed the 120 month statutory maximum. RCW 9.94A.701(9). Also, the trial court has no authority to impose a sentence that considers earned early release credits. RCW 9.94A.728; RCW 9.94A.729.

That the trial court did not ultimately sentence Mr. Gordillo-Reyes to community custody confirms Mr. Gordillo-Reyes was misadvised about a direct consequence of his plea. CP 29. A guilty plea is deemed involuntary when based on misinformation regarding a direct consequence of the plea, regardless of whether the actual sentence received was more or less onerous than anticipated. *Mendoza*, 157 Wn.2d at 590-91.

In *Mendoza*, the Supreme Court held the defendant may withdraw a guilty plea based on involuntariness where the plea is based on misinformation regarding the direct consequences of the plea, including a miscalculated offender score resulting in a lower standard range than anticipated by the parties when negotiating the plea. *Id.* at 584. "Absent a showing that the defendant was correctly informed of all of the direct consequences of his guilty plea, the defendant may move to withdraw the plea." *Id.* at 591.

The same logic applies to Mr. Gordillo-Reyes' case. The face of the plea form shows he was affirmatively misinformed about the applicability of community custody, a direct consequence of his plea. A judge has an obligation not to accept a guilty plea without "first determining that it is made voluntarily, competently and with an understanding of the nature of the charge and the consequences of the plea." *State v. Easterlin*, 159 Wn.2d 203, 208, 149 P.3d 366 (2006) (quoting CrR 4.2(d)). The judge failed in this regard.

To prevail, Mr. Gordillo-Reyes need not show reliance on the incorrect community custody provision in the plea form. "[A] defendant who is misinformed of a direct consequence of pleading guilty is not required to show the information was material to his decision to plead guilty." *Mendoza*, 157 Wn.2d at 589; *see also State v. Weyrich*, 163 Wn.2d 554, 557, 182 P.3d 965 (2008) ("The defendant need not establish a causal link between the misinformation and his decision to plead guilty.").

The *Mendoza* Court specifically rejected "an analysis that requires the appellate court to inquire into the materiality of mandatory community placement in the defendant's subjective decision to plead guilty" because "[a] reviewing court cannot determine with certainty how a defendant arrived at his personal decision to plead guilty, nor discern

what weight a defendant gave to each factor relating to the decision."

*Mendoza*, 157 Wn.2d at 590 (quoting *Isadore*, 151 Wn.2d at 302).

Where a guilty plea is based on misinformation regarding the direct consequences of the plea, the defendant may withdraw the plea based on involuntariness. *Mendoza*, 157 Wn.2d at 584. Mr. Gordillo-Reyes should be allowed to withdraw his plea because the plea agreement misinformed him he would receive community custody as a consequence of pleading guilty.

b. This constitutional error is preserved for review.

Mr. Gordillo-Reyes may raise this error on appeal even though he did not raise the issue at the trial level. An invalid guilty plea based on misinformation of sentencing consequences may be raised for the first time on appeal because it is a manifest error affecting a constitutional right under RAP 2.5(a)(3). *Mendoza*, 157 Wn.2d at 589 (citing *State v. Walsh*, 143 Wn.2d 1, 7-8, 17 P.3d 591 (2001)).

Mr. Gordillo-Reyes did not waive the error by failing to object at sentencing because no one brought the misinformation to his attention. When a defendant "is informed of the less onerous standard range before he is sentenced and given the opportunity to withdraw the plea, the defendant may waive the right to challenge the validity of the plea."

*Mendoza*, 157 Wn.2d at 591. The waiver rule applies to misinformation regarding imposition of community custody. *Quinn*, 154 Wn.2d at 219.

Mendoza waived the right to challenge the validity of his plea because he was "clearly informed before sentencing that the correctly calculated offender score rendered the actual standard range lower than had been anticipated at the time of the guilty plea, and the defendant d[id] not object or move to withdraw the plea on that basis before he [was] sentenced." *Mendoza*, 157 Wn.2d at 592. The Court distinguished Mendoza's situation from circumstances in which a defendant may not be deemed to have waived the right to challenge a plea, such as where the defendant was not informed of the mistake until after sentencing. *Id.* at 591 (*citing Walsh*, 143 Wn.2d at 7).

Mr. Gordillo-Reyes was never told at his plea he would not be sentenced to 36 months of community custody. RP 2/3/17 at 11-16. Instead, the court told him he would be subject to community custody. RP 2/3/17 at 12. The court did not qualify any statement to tell Mr. Gordillo-Reyes that if it accepted the agreed recommendation of a 120 month statutory maximum sentence, no term of community custody was legally available to him. RP 2/3/17 at 12; CP 11.

Mr. Gordillo-Reyes was not informed he was not subject to a sentence requiring 36 months community custody. Following the rule in *Mendoza*, there is no waiver here.

**Issue 2: The court imposed a no contact order that impermissibly restricts Mr. Gordillo-Reyes' constitutional right to have a relationship with his minor daughter.**

a. Mr. Gordillo-Reyes has a constitutional right to have a relationship with his daughter.

A parent has a fundamental liberty and privacy interest in the care, custody and enjoyment of his child. *Troxel v. Granville*, 530 U.S. 57, 65-66, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000); *Santosky v. Kramer*, 455 U.S. 745, 753, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982); *State v. Ancira*, 107 Wn. App. 650, 653, 27 P.3d 1246 (2001). A sentencing court may not impose a no-contact order between a defendant and his biological child as a matter of routine practice. *In re Pers. Restraint of Rainey*, 168 Wn.2d 367, 377-82, 229 P.3d 686 (2010). Before imposing an order that restricts contact between a parent and child, the court must consider whether the order barring all contact is "reasonably necessary in scope and duration to prevent harm to the child." *Id.* at 381. Both the duration of the order and the restrictions on contact must be reasonably necessary to protect the child. *Id.*

As part of Mr. Gordillo-Reyes' sentence, the court prohibited Mr. Gordillo-Reyes from having "contact with minors." CP 28. Prior to imposing the sweeping no contact provision, there was no discussion about Mr. Gordillo-Reyes' desire to maintain his father-daughter relationship with his 10 year-old. RP 4/14/17 at 21-32. His daughter was not a victim. Instead, Mr. Gordillo-Reyes knew the victims through their relationship with his daughter.

Prior to sentencing, and while in custody at the Pierce County Jail, the court allowed Mr. Gordillo-Reyes to have telephone contact with his daughter under his wife's supervision. RP 2/3/17 at 19. Seemingly just through oversight, there was no discussion at sentencing about at least supervised phone contact between Mr. Gordillo-Reyes and his daughter while he served his sentence. The court's no contact with minors order effectively barred contact between Mr. Gordillo-Reyes and his child.

b. The sentencing order barred Mr. Gordillo-Reyes from having any contact with his daughter contrary to its pre-trial order and without considering reasonable alternatives.

Even a parent convicted of a sexual offense involving a child is not automatically prohibited from having contact with his own children, including a limitation on only supervised contact. *State v. Letourneau*, 100

Wn. App. 424, 441, 997 P.2d 436 (2000). A years-long no contact provision is a draconian prohibition that must be justified. *Rainey*, 168 Wn.2d at 381.

When imposing a no contact order as part of a criminal sentence, the order may not impact a parent's right to contact his child unless the state presents evidence and the court finds the limitations are reasonably necessary to protect the child from harm. *Rainey*, 168 Wn.2d at 381; *Letourneau*, 100 Wn. App. at 441.

In *Letourneau*, the court rejected a no-contact order entered as a sentencing condition that permitted only supervised contact between a mother and her minor children. 100 Wn. App. at 437. The defendant was convicted of two counts of rape of a child in the second degree for her illicit relationship with a minor student, but she was also the mother of three young children whom she had not been accused of mistreating. *Id.* at 442.

While recognizing the state's interest in preventing harm to Letourneau's children, the court found the restriction allowing only supervised contact was not reasonably necessary. *Id.* at 441. The *Letourneau* court further noted there are "more appropriate forums than the criminal sentencing process to address the best interests of dependent children" regarding their contact with their parents, such as family court for dissolution issues and juvenile court for dependency matters. *Id.* at

443. In these more appropriate forums, a guardian ad litem could investigate the children's needs regarding their relationship with their mother, or offer the children "professional intervention" as the individual circumstances required. *Id.* at 442. In sum,

[i]t is the business of the family and juvenile courts to address the best interests of minor children with respect to most other kinds of harm that could arise during visitation with a parent who has been convicted of a crime, including psychological harm that might arise from that parent's communications with the children regarding the crime. To that end, the family and juvenile courts . . . have broad discretion to tailor orders that address the needs of children in ways that sentencing courts in criminal proceedings cannot. Sentencing courts in criminal proceedings must necessarily operate within the limitations on court discretion contained in the SRA.

*Id.*

Similarly to *Letourneau*, Mr. Gordillo-Reyes had a child not involved in the offenses for which he was convicted. RP 2/3/17 at 17-19. But the court's no contact order prohibited any contact between Mr. Gordillo-Reyes and his daughter until she, arbitrarily, reaches her majority at age 18. The court barred Mr. Gordillo-Reyes from sending letters or having telephone calls with his daughter. The court gave no reason for the "until no longer a minor" duration of the order barring contact which undermines the lawfulness of the court's order. *See Rainey*, 168 Wn.2d at 381.

What is reasonably necessary to protect the state's interests can change over time. The command that restrictions on fundamental rights be sensitively imposed is not satisfied merely because, at some point and for some duration, the restriction is reasonably necessary to serve the state's interests. The restriction's length must also be reasonably necessary. *See State v. Gitchel*, 5 Wn. App. 93, 94–95, 486 P.2d 328 (1971) (holding “unhesitatingly” that a sentencing condition banishing the defendant from the state forever would be unconstitutional); *In re Pers. Restraint of Matteson*, 142 Wn.2d 298, 311, 12 P.3d 585 (2000) (approving of *Gitchel* as “quite proper[ ]”); *cf. State v. Warren*, 165 Wn.2d 17, 34–35, 195 P.3d 940 (2008) (upholding a lifetime no contact order when the defendant had been convicted of murder and of beating the subject of the order, who had testified against the defendant).

The broad no contact with minors restriction may not be ordered without the state demonstrating it is reasonably necessary to realize a compelling state interest. *Rainey*, 168 Wn.2d at 381-82. Because the sentencing condition implicates Mr. Gordillo-Reyes’ fundamental constitutional right to parent his daughter, the state must show that no less restrictive alternative would prevent harm to her. *Id.* Any limitations must be narrowly drawn. *Id.*

c. The remedy is to strike the no contact provision and impose only reasonably necessary orders involving contact with the daughter.

Any order that limits Mr. Gordillo-Reyes' ability to exchange letters, telephone calls, or have visits with his daughter must be predicated on proven findings regarding necessary limitations on contact. The sentencing condition barring any contact between Mr. Gordillo-Reyes and his daughter until she reaches majority at 18 should be stricken and, at a new sentencing hearing, the court should consider the reasonable alternatives after conducting the necessary fact-specific inquiry regarding the needs of Mr. Gordillo-Reyes' daughter. *Rainey*, 168 Wn.2d at 382.

#### **E. CONCLUSION**

Mr. Gordillo-Reyes is entitled to remand to withdraw his guilty plea. Alternatively, Mr. Gordillo-Reyes respectfully asks this Court to reverse the broad no contact with minors order imposed as part of his sentence and permit him to have reasonable contact with his daughter.

Respectfully submitted December 29, 2017.



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LISA E. TABBUT/WSBA 21344  
Attorney for Jesus Gordillo-Reyes

## **CERTIFICATE OF SERVICE**

Lisa E. Tabbut declares:

On today's date, I filed the Brief of Appellant to (1) Pierce County Prosecutor's Office, at [pcpatcecf@co.pierce.wa.us](mailto:pcpatcecf@co.pierce.wa.us); (2) the Court of Appeals, Division II; and (3) I mailed it to Jesus Gordillo-Reyes, DOC#398651, Stafford Creek Corrections Center, 191 Constantine Way, Aberdeen, WA 98520.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed December 29, 2017, in Winthrop, Washington.

A handwritten signature in dark ink, appearing to be 'Lisa E. Tabbut', with a long horizontal stroke extending to the right.

Lisa E. Tabbut, WSBA No. 21344  
Attorney for Jesus Gordillo-Reyes, Appellant

# **LAW OFFICE OF LISA E TABBUT**

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## **Transmittal Information**

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